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MARKIBRA SERVICES SDN BHD

v.

DATUK BANDAR KUALA LUMPUR

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[APPLICATION FOR JUDICIAL REVIEW NO: R2(4)-25-40-2010]
8 MARCH 2011

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ADMINISTRATIVE LAW: *Exercise of administrative powers - Development order - Renewal of - Applicant for extension - Enforcement Notice issued to applicant and to occupants to cease operation of activities - Whether development order can be renewed - Whether respondent acted fair and reasonable in rejecting extension of development order - Whether*

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respondent committed procedural impropriety in decision making process - Whether applicant's legitimate expectation affected due to non-renewal of order

ADMINISTRATIVE LAW: *Judicial review - Certiorari & mandamus - Development order - Renewal of - Applicant applied for extension - Enforcement Notice issued to applicant and to occupants to cease operation of activities - Whether development order can be renewed - Whether respondent acted fair and reasonable in rejecting extension of development order - Whether respondent committed procedural impropriety in decision*

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making process

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This application centered on the operation and business site of Bangsar Seafood Restaurant ('Bangsar Seafood') which was developed by the applicant and had begun operation at Bangsar Baru ("Bangsar Village 2"). Bangsar Seafood was then moved to

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a vacant land situated along the respective lots at Jalan Ara which was an area zone for residential use. The applicant then applied to the respondent for planning permission to change the use of the respective land at Jalan Ara from residential to commercial use on a temporary basis. The application was approved but it was

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objected by neighbouring land owners as well as from the Bangsar Baru Residents Association ("BBRA"). The respondent then decided that the maximum renewal that would be granted to the applicant was for a period of five years, *ie*, until 31 December 2009. On 23 November 2009, the applicant applied to the

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respondent to have the planning application to be extended for a

period of ten years which was rejected by the respondent. The respondent had then on 29 December 2009 issued Enforcement Notices to the applicant and to the occupants of Bangsar Seafood to cease all commercial activities within fourteen days. The applicant contended that the respondent had taken into account irrelevant considerations when reaching the said decision and that the applicant had legitimate expectation that a renewal of the second development order would have been automatically granted by the respondent based on the five extensions previously given by the respondent. The applicant had thus sought judicial review for an order of *certiorari* to quash the respondent's decision and for an order of *mandamus* to compel the respondent to grant a renewal of the development order for another ten years or any other period which was deemed fair and reasonable by the court.

Held (dismissing the applicant's application):

(1) It is well established law that where judicial review is concerned, the court is not concerned with the decision, but with the decision making process. Without this restriction, the court would, under the guise of preventing the abuse of power, be itself guilty of usurping power. It was not the court's role to have determined the accuracy of the respondent's considered decision not to allow the extension to the applicant's application. (paras 28 & 31)

(2) The respondent had taken liberty to open the information gathering process by including all of the affected parties before making its decision. The applicant had failed to demonstrate that the final outcome of the respondent was beyond the normal dictation of common sense. The respondent had not committed any procedural impropriety in the decision making process nor could it be said that the said decision was based on grounds of illegality or irrationality. The respondent had been transparent and allowed for the hearing of all parties before making their considered decision. (paras 33 & 35)

(3) In deciding the issue of legitimate expectation, it was necessary for the court to view the facts that had led to such expectation. There was no legitimate expectation that could arise from the yearly renewal of the planning application. This was because the applicant had been forewarned and foretold that such extension was with limitation and that the limitation

A date was up to 31 December 2009. The BBRA and the neighbouring owners who were residents of Bangsar Baru also had their rights and legitimate expectation that Bangsar Seafood would only be in business along Jalan Ara until 31 December 2009. (para 36)

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(4) The court had detected no illegality or irrationality in the respondent's stand that they should not be held at ransom for the applicant's failure to make prudent business decision such as the unsuccessful bid to regain the cost of renovation within
C the constraint of the limitation date. (para 37)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Anisminic Ltd v. Foreign Compensation Commission [1969] 1 All ER 208
D ***(refd)***

Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 ***(refd)***

Dr Chandra Muzaffar v. Universiti Malaya [2002] 2 CLJ 448 HC ***(refd)***

Khoo Ah Imm & Ors v. Datuk Bandar Kuala Lumpur & Anor [1997] 3 CLJ 519 CA ***(refd)***
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Lee Freddie & Ors v. Majlis Perbandaran Petaling Jaya & Anor [1994] 1 LNS 212 HC ***(refd)***

Lee Hay v. Yang Di Pertua Majlis Daerah Hulu Langat & Anor [1998] 5 CLJ 367 HC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna
F *Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC* ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

R v. North and East Devon HA, Ex parte Coughlan [2000] 2 WLR 622 ***(refd)***

R v. Sec of State for Home Dept Ex p Brind [1991] I AC 696 ***(refd)***
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Tesco Stores v. Secretary of State [1995] 2 All ER 636 ***(refd)***

YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v. Datuk Bandar Kuala Lumpur & Anor [2005] 7 CLJ 41 HC ***(refd)***

Legislation referred to:

H Federal Territory (Planning) Act 1982, s. 22

For the applicant - Tommy Thomas; M/s Tommy Thomas
For the respondent - B Thangaraj; M/s Thangarah & Assoc

Reported by Kumitha Abdul Majid

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JUDGMENT

Mohd Zawawi Salleh J:

The Application

[1] This case concerns an application by the applicant, *inter alia*, for the following reliefs:

(a) An order for *certiorari* to quash the decision of the respondent given by way of its letter dated 21 January 2011;

(b) An order of *mandamus* compelling the respondents to grant a renewal of the development order dated 8 December 2003 for ten years or any other period deem fair and reasonable by this court to the applicant for the use of its premises at Lot nos. 22268 - 22272, 22335 - 22345 and 22347 - 22353, Jalan Ara, Bangsar, Kuala Lumpur;

(c) An order that the enforcement notices by Form 9 dated 22 January 2011 by the respondent to the applicant and to occupants of the said premises be stayed pending the final determination of the proceedings; and

(d) Costs.

Background Facts

[2] This application is centered on the operation and business site of Bangsar Seafood Restaurant ("Bangsar Seafood") which was developed by the applicant. Sometime in 1988, Bangsar Seafood begun operation at Lot No. 43872, 43873 and 43874 in Bangsar Baru ("Bangsar Village 2").

[3] The registered proprietor of Bangsar Village 2 is Eng Lian Enterprise Sdn Bhd ("Eng Lian") who is not a party to this application. In 2001, Eng Lian intended to develop Bangsar Village 2 (Bangsar Seafood original site) for commercial development into a shopping complex. Upon negotiation with the applicant, it was agreed that Bangsar Seafood be moved to Eng Lian's vacant land at Lot nos. 22268 - 22272, 22335 - 22345 and 22347 - 22353 along Jalan Ara, Bangsar, Kuala Lumpur. The relocation was agreed, with the understanding that upon completion of the shopping complex, Bangsar Seafood would then be relocated back to Bangsar Village 2. Hence the whole idea of relocating Bangsar Seafood was in its original sense, temporary in nature.

[4] Unfortunately for Bangsar Seafood, the premises at Lot nos. 22268 - 22272, 22335 - 22345 and 22347 - 22353, Jalan Ara, Bangsar, Kuala Lumpur are at an area zone for residential use. The applicant was required to apply to the respondent for planning permission to change the land use of Jalan Ara land on a temporary basis from residential to commercial use.

[5] The applicant applied to the respondent for such change. The first two applications were rejected by the respondent. The applicant appealed for the second time, citing its previous reasons together with some additional political support from the then Member of Parliament for Lembah Pantai, Datuk Seri Shahrizat Bt Abdul Jalil. The third application was considered by the Town Planning Committee and on 29 April 2003, the planning application was approved on a temporary basis.

[6] Some conditions were later on imposed to the approval and the planning application was varied. The development order dated 8 December 2003 is the varied planning approval which is relevant to this application.

[7] It must be noted that such approval was not without stern objections from the neighbouring land owners as well as from the Bangsar Baru Residents Association ("BBRA").

[8] I mentioned there were stern objections because from such objections, a meeting dated 12 August 2004 was held between the BBRA and the neighbouring owners and the representatives for the Member of Parliament for Lembah Pantai with the Director of the Planning Department, being the chairman of the said meeting. In that meeting, the chairman informed those who attended that the approval which was granted was for temporary basis. On 4 October 2004, the respondent decided that the maximum renewal which would be granted to the applicant was for a period of five years that is until 31 December 2009.

[9] The development of Bangsar Village 2 land was completed sometime in August 2006 and the certificate for fitness was issued on 28 September 2006. The applicant should be able to relocate to the shopping complex by September 2006 but instead chose to apply for the maximum extension until the end of the development order ie, for five years till 31 December 2009.

[10] Routinely, on 19 November 2009, the applicant applied for the 6th extension of the planning application to be effective until 31 December 2011, citing the need to provide work for 250 of their employees and that they were still in the midst of collecting the return costs as they had incurred about RM20 million in their costs of construction.

[11] This is beyond the 31 December 2009 dateline that was initially agreed upon. On 23 November 2009, the applicant also applied to have the planning application to be extended for a period of ten years, instead of yearly approvals.

[12] The respondent, in considering the applicant's application for yearly extension, rejected the 6th extension as it was already approaching the end of the term. Thereafter, on 29 December 2009, the respondent decided to issue enforcement notices to the applicant and to the occupants of the Bangsar Seafood at the premises along Jalan Ara, directing them to cease all commercial activities and to remove all equipments from the said premises within 14 days. This order was communicated to the applicant on 21 January 2011. Thus, for the purpose of this judgment, the impugned decision is the 21 January 2011 order.

[13] The applicant then sought judicial review for an order of *certiorari* to quash 21 January 2011 impugned decision and for an order of *mandamus* compelling the respondents to grant a renewal of the development order dated 8 December 2003 for another ten years or any other period deem fair and reasonable by this court for the use of its premises at Lot nos. 22268 - 22272, 22335 - 22345 and 22347 - 22353, Jalan Ara, Bangsar, Kuala Lumpur.

Submission Of The Applicant

[14] Learned counsel for the applicant submitted that the respondent had erred in law in making 21 January 2011 impugned decision because the respondent disregarded relevant considerations and took into account irrelevant considerations when reaching the said decision.

[15] According to learned counsel, in arriving at the said decision, the respondent had disregarded, the following considerations:

(i) that the respondent had continuously given annual renewals to the Original Development Order from 2004 to 2009 for the applicant and its occupants to carry on business as restaurants and real estate agent at the said premises;

(ii) that relying on the said renewals, over RM20 million were spent by the applicant to develop and beautify the said premises and their surrounding areas which capital costs can only be recovered if the business is carried on for many years;

(iii) that a further RM2 million was spent by the applicant and its tenants in 2009 to refurbish some of the other outlets in the said premises, with some new restaurants just commencing business thereat;

(iv) that the applicant has at all material times complied with all the terms and conditions imposed by the respondent since the development order was first approved on 16 May 2003 ("the Initial Development Order"); and

(v) that the development of the said premises is consistent with the Draft Kuala Lumpur City Plan 2020 which designates Bangsar as a District Centre Commercial Zone.

[16] The applicant avers that the respondent had also took into account irrelevant considerations when arriving at the said decision, namely:

(i) A purported five year term for the development orders granted to the applicant, which was to expire on 31 December 2009 (which fact was never made known to the applicant);

(ii) The land where the said premises are situated was all along intended to be for residential purposes only - whereas in fact, even from 1990, the respondent has been granting planning approvals for the said land and permission to convert the use of the land into commercial purposes;

(iii) In so far as objections of residents are concerned, the respondent has been granting the development orders and renewal thereto despite such objections since 2002, that is, even before the first development order was granted by the respondent;

(iv) The respondent failed to take into account the fact that Jalan Ara has been converted into a commercial zone and/or a mixed development area; and

(v) The granting of development orders to the applicant for the said premises was pending the completion of the new Bangsar Village (2) building, which was submitted to be irrelevant to

these proceedings as that issue was only alive in 2000, much earlier before the development orders were granted, and the continuous renewals to the 2nd development order even after Bangsar Village (2) was completed would have meant that the "temporary" removal (which was denied) was no longer a relevant issue, even for the respondent.

[17] To support his submission, learned counsel for the applicant cited the following cases:

(i) *Anisminic Ltd v. Foreign Compensation Commission* [1969] 1 All ER 208.

(ii) *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143.

(iii) Section 22 of the Federal Territory (Planning) Act 1982; and

(iv) *Lee Hay v. Yang Di Pertua Majlis Daerah Hulu Langat & Anor* [1998] 5 CLJ 367.

[18] The applicant further submitted that the applicant has a legitimate expectation that a renewal of the 2nd development order would be routinely and automatically granted by the respondent, based on the five extensions to the 2nd development order previously given by the respondent. In consequence, the applicant reasonably expected that renewals would be continuously and automatically granted to the 2nd development order and so acted.

[19] To support his submission, learned counsel for the applicant cited the following cases:

(i) *Dr Chandra Muzaffar v. Universiti Malaya* [2002] 2 CLJ 448;

(ii) *R v. North and East Devon HA, Ex parte Coughlan* [2000] 2 WLR 622.

[20] So, in this instant case, by constantly renewing the 2nd development order, representations were made by the respondent to the applicant that the 2nd development order will be further renewed, and the applicant had relied on these representations by, *inter alia*, making huge investments on the said premises and entering into tenancy agreement up to 2017. The respondent is now estopped from retracting their approval in respect of the development of the said premises.

[21] Additionally, it is submitted that the said decision by the respondent constituted Wednesbury unreasonableness on its part as no reasonable planning authority would have decided not to grant renewals to the 2nd development order in the circumstances.

Submission By The Respondent

[22] The respondent submitted that the applicant should not be challenging 21 January 2011 impugned decision as it merely represent as a consequential decision to the development order dated 8 December 2003 which was made by the respondent earlier. It was submitted that the development order dated 8 December 2003 was communicated to the applicant's architect who had acted on behalf of the applicant. This means that 8 December 2003 decision remains unchallenged for the past six years and that the applicant cannot use the consequential decision as a means to reopen the doorway to challenge the 8 December 2003 decision.

[23] Learned counsel for the respondent cited the following cases to support its contention:

(i) *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65; and

(ii) *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805.

[24] Regarding the legitimate expectation issue as raised by the applicant, the respondent denied any existence of legitimate expectation for the following reasons:

(i) That the applicant's application is for temporary planning approval pending the development of Bangsar Village 2 shopping complex. Thereafter, the Bangsar Seafood would be relocated back to Bangsar Village 2.

(ii) There could not be any legitimate expectation as the yearly approval specifically states that it is granted on a yearly basis.

(iii) The amount spent by the applicant to renovate their business is independent to the respondent's decision and is totally the prerogative of the applicant. Recouping the applicant's expenditure is the applicant's business decision and the

respondent should not be held responsible for such business decision. Furthermore, the alleged RM20 million is without any documentary evidence.

(iv) The strenuous objections from BBRA and the neighbouring owners when the applicant commenced construction led to the respondent's decision that the maximum extension would be for five years (that is until 31 December 2009). The respondent claims that this decision was a considered decision as it was after the respondent had heard all parties, including the applicant. This considered decision was also communicated to the applicant's architect, Eng Lian and BBRA.

[25] The respondent reminded the court that the (iv) issue above leads to another conclusion. It is this. That the BBRA and the neighbouring owners who are residents of Bangsar Baru also have rights and legitimate expectation. Their legitimate expectation would be that the respondent remains steadfast with the decision that Bangsar Seafood would only be in business along Jalan Ara until 31 December 2009.

[26] Learned counsel for the respondent cited the following cases to support its counter argument on the legitimate expectation issue:

(i) *Khoo Ah Imm & Ors v. Datuk Bandar Kuala Lumpur & Anor* [1997] 3 CLJ 519; and

(ii) *Lee Freddie & Ors v. Majlis Perbandaran Petaling Jaya & Anor* [1994] 1 LNS 212.

[27] There are other issues submitted by the respondent and it is the court's considered view that they are not necessary to be detailed in this judgment.

Court's Finding

[28] It is well established law that where judicial review is concerned, the court is not concerned with the decision, but with the decision making process. Without this restriction, the court will be, under the guise of preventing the abuse of power, be itself guilty of usurping power (per Lord Brightman at p. 1173 in *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155).

[29] In deciding matters related to judicial review, particularly when it is against the decision of a planning authority, the court must take cognizance that the considered decision of a planning authority, such as the respondent, are made upon relying on materials and information that are within their possession and knowledge. It must be within the scope of planning for Kuala Lumpur. In *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v. Datuk Bandar Kuala Lumpur & Anor* [2005] 7 CLJ 41, it was decided by Raus Sharif J (as he then was) as follows:

> It had been said before that in cases of this nature, it is not the function of the court to adjudicate upon the merits of the decision of the planning authority. To me, in matters of planning approval and whether planning approval should be granted or refused is a matter for the first respondent to decide. The first respondent with the materials and information that he has is in a position to decide or determine how the planning of Kuala Lumpur should take place. The court's duty is only to see that the matter in hand has been determined by the first respondent in accordance with the relevant laws.

[30] In *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, Edgar Joseph Jr FCJ cited the speech of Lord Hoffmann in *Tesco Stores v. Secretary of State* [1995] 2 All ER 636 to explain the importance of leaving the decision to plan to the planning authority:

> So, what then are the appropriate remedies which we should grant? In considering this question we have derived assistance from the following passages in the judgment of Lord Hoffmann speaking in the House of Lords in *Tesco Stores v. Secretary of State* [1995] 2 All ER 636, at p. 657:
>
> > *... The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all.*

> *The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.*
>
> *That there is a distinction between whether something is a material consideration and the weight which should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State.* (emphasis added).

Edgar Joseph Jr FCJ then continued to explain that the court should only be focusing on the decision-making process and not with the merits of the decision when he said:

> In the field of planning law, the Court must remind itself of the fluid nature of statutory purposes and not to restrict itself by giving undue weight to the original intention of Parliament. It has been said, and we agree, that the goals of a scheme of public regulation are inevitably influenced by what administrators do, and by what they need to do to keep abreast of changing social and professional expectations. This explains why planning legislation invests in the planning authority a broad discretion.

[31] Bearing in mind with the above perimeters in this judicial review, the court is mindful that it is not this court's role to determine the accuracy of the respondent's considered decision not to allow the extension to the applicant's application.

[32] The court's rule is confined only to a secondary review while the primary decision would be with the respondent. Lord Bridge explained the primary and secondary review in *R v. Sec of State for Home Dept Ex p Brind* [1991] I AC 696 as follows:

> The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable secretary, on the material before him, could reasonably make the primary judgment.

[33] Looking at the facts that has been submitted to the court as well as from the cause papers, it appears that the respondent had taken liberty to open the information gathering process to include all of the affected parties before making its decision. It was also clear that the decision made were upon considering all these information. The question is, are these information relevant or irrelevantly considered by the respondent?

[34] In searching for guidance, the decision of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143 is certainly apt where at p. 148 Raja Azlan Shah A-G CJ (as His Majesty then was) had said:

> On principle and authority, the discretionary power to impose such conditions "as they think fit" is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture Houses, Ltd v. Wednesbury Corporation* [1974] 2 All ER 685, have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; ... (emphasis added)

[35] The court has combed through the considerations raised by the applicant and unfortunately, the applicant has failed to demonstrate to the court that the final outcome of the respondent is beyond the normal dictation of common sense. The respondent had not committed any procedural impropriety in the decision making process nor could it said that 21 January 2011 impugned decision was based on grounds of illegality or irrationality. In fact, the respondent was also transparent and allowed for the hearing of all parties before making their considered decision.

[36] In deciding the issue of legitimate expectation, it is necessary for the court to view the facts which has led to such expectation. Considering the facts produced by both parties, the court is inclined to agree with the respondent's submission that there is no legitimate expectation that could arise from the yearly renewal of the planning application. This is because the applicant have been forewarned and foretold that such extension is with limitation date and that the limitation date is up to 31 December 2009. In fact, the court is also in full agreement with the respondent's reminder that the BBRA and the neighbouring owners who are residents of

Bangsar Baru also have rights and legitimate expectation that Bangsar Seafood would only be in business along Jalan Ara until 31 December 2009.

[37] The court also detects no illegality or irrationality in the respondent's stand that they should not be held at ransom for the applicant's failure to make prudent business decision such as the unsuccessful bid to regain the cost of renovation within the constraint of the limitation date.

[38] Upon the reasons explained above, the court is of the opinion that the application was not meritorious and dismissed the same with cost of RM20,000 to the respondent.